IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOEL HARDEN,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	No. 05-120
CITY OF PHILADELPHIA, et al.,	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J. **JANUARY 9, 2006**

Presently pending before me is Defendant City of Philadelphia's ("City") Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56. Plaintiff Joel Harden ("Harden") did not respond. For the following reasons, the City's Motion is granted.

I. RELEVANT BACKGROUND

This is a case about the rigors of posting signs in Philadelphia. Harden wanted to post signs around his neighborhood advertising his house buying business. Through his corporation, HCFD Corporation ("HCFD"), Harden applied for a permit to hang signs from the City's Department of Licenses and Inspections ("L&I"). L&I issued HCFD a temporary sign poster permit allowing Harden to post 100 signs on telephone poles in the neighborhood surrounding Harden's building located at 5541-47 Germantown Avenue. In addition to HCFD, Harden's building was the business location of other commercial tenants. Soon after issuing HCFD the permit to hang signs, L&I determined that Harden put up 300 signs. Not only did Harden go over his 100 sign limit, but, according to the City, the signs were larger than was permitted. L&I

determined that the permit was issued in error and ordered HCFD to remove its signs.

According to Harden, after HCFD did not take down all of its signs in the time designated by the City, the Police Department ceased the operations of all businesses and tenants at the location. According to Harden's Complaint, there were other tenants at 5541-47 Germantown Avenue with no affiliation with HCFD who the City "had no right, authority, or power to cease operations of all commercial and residential tenants at the property owned by the Plaintiff." (Pl.'s Compl. ¶ 20). Thereafter, Harden avers, on several successive occasions, the City shut down the operations not only of HCFD, but of all the tenants and businesses at the location causing Harden, as owner of the location, significant harm.

Prior to filing this lawsuit, Harden, through his corporate entity, HCFD, filed a complaint in Equity with the Philadelphia Court of Common Pleas alleging that the City, through L&I, unlawfully issued violation notices for failure to comply with the City code regarding sign postings. HCFD further alleged that the City unlawfully issued "cease operations" orders for alleged illegal sign postings. HCFD alleged that the unlawful conduct by the City was a violation of its constitutional rights. HCFD further alleged that the City's alleged unconstitutional acts caused it to suffer damages in excess of $50,000.00 and sought a temporary restraining order.

On January 30, 2003, the Honorable Matthew D. Carrafiello of the Philadelphia Court of Common Please held a hearing to determine whether the City of Philadelphia lawfully issued the violations notices and to determine whether the City lawfully issued and executed the "cease operations" order. Harden appeared as the representative for HCFD. Harden and HCFD were represented by counsel and had the full opportunity to present evidence and cross-examine all witnesses. Harden even presented his own testimony arguing that the City unlawfully issued the

violation notices and the "cease operations" orders. At the conclusion of the hearing, Judge Carrafiello made the following findings:

> That concludes the hearing. Well, I'll issue my findings right now. I find that petitioner is in violation of the City code, that petitioner has not shown that the cease order has been illegally – is illegal; has not shown that he has afforded himself of the legal redress that the City code has for instances where a cease and desist order has been issued, but instead has moved directly towards a court of equity.
>
> It is necessary for the petitioner to seek relief that is part of law, as opposed to equity.
>
> Further, [t]his Court is very concerned that, in fact, petitioner has spent so much time, but has not been able to demonstrate a concerted effort to abate the nuisance that he has created. Therefore, [t]his Court is denying the equitable relief that he has requested.
>
> This Court finds that the City has – while the City did make a mistake in issuing the initial permit, that the mistake was rectified and the City was given – I'm sorry. The City has given due consideration to the petitioner and has even extended a period of time from which petitioner has not been able to show that, in fact, he has dealt with or that it has dealt with in good faith with the Department of Licenses and Inspections or the Law Department.
>
> Now there is a issue as to the tenants in the building. Tenants may have a right to be in that building; however, they are not party to this action, nor are they present. This Court will grant leave to any such tenants to intervene in this action, even intervene informally. However, they must come forward, identify themselves and show their legal right to be in that building.
>
> I'm going to suggest that such a showing be made to the Law Department and that the Law Department instruct the police department to allow any persons who have a putative right to be in that premises to be in that premises.
>
> If not, [t]his Court will see that any person who can substantiate their right to be present will be present. I will not issue a written order. This order is dictated into the record. This Court will hear any further petitions, if and when the circumstances warrant. This hearing is concluded.

(Def.'s Summ. J. Mot., Ex. B at 40-44).

On January 11, 2005, after losing in state court as HCFD, Harden filed his Complaint against the following Defendants: the City; L&I; Philadelphia Police Department's 14th Police District ("Police Department"); and three unnamed police officers. On May 18, 2005, I partially granted the City's motion to dismiss Harden's claims. I dismissed all the claims against the Police Department and L&I because they were administrative arms of the City. I also dismissed the state law claims against the City because they did not fall within one of the eight exceptions to government immunity. However, I allowed Harden's claim for municipal liability against the City and found that it was not barred by the Rooker-Feldman doctrine or issue preclusion. The City, pursuant to its motion for summary judgment, requests that I dismiss Harden's only remaining claim, his § 1983 claim for municipal liability. Granting the City's motion for summary judgment will end the Harden's action.

II. STANDARD OF REVIEW

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). The moving party has the initial burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson, 477 U.S. at 249. A factual dispute is material only if it might

affect the outcome of the suit under governing law. Id. at 248.

To defeat summary judgment, the non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Similarly, the non-moving party cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989)(citing Celotex, 477 U.S. at 325 (1986)). Further, the non-moving party has the burden of producing evidence to establish prima facie each element of its claim. Celotex, 477 U.S. at 322-23. If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Id. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

By failing to respond to the City's Motion for Summary Judgment, Harden waived his right to controvert the facts asserted by the City in its Motion or the supporting material accompanying it. Anchorage Assocs., et al., v. Virgin Islands Bd. of Tax Review, 922 F.2d 168, 175 (3d Cir. 1990). Harden's lack of a response, however, does not mean the City's Motion for Summary Judgment will automatically be granted. "Even though Rule 56(e) requires a non-moving party to 'set forth specific facts showing that there is a genuine issue for trial,' it is 'well-settled . . . that this does not mean that a moving party is automatically entitled to summary judgment if the opposing party does not respond.'" Id. (quoting Jaroma v. Massey, 873 F.2d 17 (1st Cir. 1989)). Rule 56(e) clearly states: "If the adverse party does not so respond, summary judgment, *if appropriate*, shall be entered against the adverse party." FED. R. CIV. P. 56(e) (emphasis added). Therefore, I must determine whether the City has shown themselves to be

entitled to judgment as a matter of law.

III. DISCUSSION

The City makes three arguments supporting its motion for summary judgment. First, Harden has no evidence that the City violated his Constitutional rights. Second, Harden's claims are barred by the Rooker-Feldman Doctrine. Third, Harden is precluded from re-litigating the issues related to the violation notices and the "cease operations" orders. I will consider each of these arguments in turn.

A. No Evidence of a Constitutional Violation

Count I of Harden's Complaint alleges a § 1983 violation due to the City's failure to train, supervise and discipline its employees in the areas of unreasonable force, unlawful entry into property, and malicious use of process. Unfortunately, by failing to reply to the City's motion for summary judgment, Harden only presents the allegations he made in his complaint and presents no specific facts that there is a genuine issue for trial. Harden's § 1983 claim, therefore, cannot survive summary judgment.

A city may be held vicariously liable for the unconstitutional actions of its agents when the agent's conduct was the result of a "municipal policy" or a "well-established custom." Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978). A municipal policy is a "a statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Id. at 690. A custom is a "persistent and widespread" practice of government action that is "so permanent and well settled as to constitute a custom or usage with the force of law." Id. at 691. However, a municipality cannot be held liable for a § 1983 violation solely on the basis of the existence of an employee-employer's relationship with a tortfeasor. Bd. of the County Comm'rs

v. Brown, 520 U.S. 397, 403 (1997). Rather, the complaint of injury must be causally linked to a custom or policy of the municipality pursuant to which an employee was acting. Beck v. City of Pittsburgh, 889 F.3d 966, 972 (3d Cir. 1996). Further, the City can only be liable for a constitutional deprivation if there is a direct causal link between a policy or custom and the alleged constitutional deprivation. See City of Canton v. Harris, 489 U.S. 378, 385 (1989); Brown v. Muhlenberg Twp., 269 F.3d 205, 214-15 (3d Cir. 2001).

By relying solely on his Complaint, Harden presents no evidence at all, let alone evidence of deliberate indifference. By failing to respond to the City's motion for summary judgment, Harden chose to accept the City's factual allegation that he had conducted no discovery on the issue of municipal liability. Harden cannot meet the factual burden necessary to sustain a § 1983 claim against the City's motion for summary judgment because he presents no evidence of a constitutional violation. He presents no evidence that a responsible City policymaker had contemporaneous knowledge of the offending constitutional violation or knowledge of a pattern of prior incidents of similar violations. He presents no evidence that a City policymaker, who knew about the alleged constitutional violations, failed to take adequate measures to stop the violations or otherwise communicated a message of approval to those committing violations. Therefore, Harden's § 1983 claim cannot survive the City's motion for summary judgment because he has failed to show that there is a genuine issue for trial.

B. The Rooker-Feldman Doctrine

The City also argues that Harden's claims are barred by the Rooker-Feldman Doctrine. I disagree.

"The Rooker-Feldman Doctrine bars federal jurisdiction under two circumstances: if the

claim was 'actually litigated' in state court or if the claim is 'inextricably intertwined' with the state court adjudication." ITT Corp. v. Intelnet Int'l Corp., 366 F.3d 205, 210 (3d Cir. 2004). In determining whether an issue was "actually litigated" by the state court, "a plaintiff must present its federal claims to the state court, and the state court must decide those claims." Id. at 210 n.8 (citing Desi's Pizza, Inc. v. City of Wilkes-Barre, 321 F.3d 411, 419 (3d Cir. 2003)). Determining that a claim was "actually litigated" "requires that the state court has considered and decided precisely the same claim that the plaintiff has presented to the federal court." Id.

The United States Court of Appeals for the Third Circuit ("Third Circuit") defined whether claims are "inextricably intertwined" with the state court adjudication by stating:

> [s]tate and federal claims are inextricably intertwined (1) when in order to grant the federal plaintiff the relief sought, the federal court must determine that the state court judgment was erroneously entered [or] (2) when the federal court must . . . take action that would render [the state court's] judgment ineffectual. . . . If the relief requested in the federal action requires determining that the state court's decision is wrong or would void the state court's ruling, then the issues are inextricably intertwined and the district court has no subject matter jurisdiction to hear the suit.

Id. (internal quotation marks and citations omitted). As noted by the Third Circuit, "the first step in a Rooker-Feldman analysis is to determine exactly what the state court held." Id. (citing Gulla v. N. Strabane Township, 146 F.3d 168, 171 (3d Cir. 1998)).

In its Motion to Dismiss, the City argued that Harden's claims were barred by both the Rooker-Feldman Doctrine and issue preclusion. Denying the City's Rooker-Feldman Doctrine argument, I ruled that the "[p]laintiff's claims in this case arise from his position as owner of the building and the City's closure of the entire building rather than just the closure of HCFD." Harden v. City of Philadelphia, et al., Civ. No. 05-120, 2005 U.S. Dist. LEXIS 9396, at *9 (E.D.

Pa. May 18, 2005). I reasoned that Judge Carrafiello never considered the impact the City's actions had on other tenants of the building and that Harden's claims as owner of the entire building were not "actually litigated" in state court. Id. As Judge Carrafiello stated:

> Now there is a issue as to the tenants in the building. Tenants may have a right to be in that building; however, they are not party to this action, nor are they present. This Court will grant leave to any such tenants to intervene in this action, even intervene informally. However, they must come forward, identify themselves and show their legal right to be in that building.
>
> I'm going to suggest that such a showing be made to the Law Department and that the Law Department instruct the police department to allow any persons who have a putative right to be in that premises to be in that premises.

(Def.'s Summ. J. Mot., Ex. B at 43).

The City currently makes the same Rooker-Feldman argument in its Motion for Summary Judgment. It argues that the difference between the standard of review for the two motions is crucial because, through discovery, the City has learned that Harden and HCFD are one and the same. The City argues that Harden's federal case "re-alleges almost every fact and legal issue that was raised or could have been raised in the state court proceedings." (Def.'s Summ. J. Mot. at 10) (footnote omitted). The City, therefore, argues that Harden's federal case seeks to void Judge Carrafiello's order. Such a collateral attack, the City argues, violates the Rooker-Feldman Doctrine. I disagree.

Recently, the Supreme Court of the United States ("Supreme Court") explained the subtle differences between the Rooker-Feldman Doctrine and issue preclusion. Exxon Mobil Corp., et al., v. Saudi Basic Industries Corp., 125 S.Ct. 1517 (2005). Narrowing the scope of the Rooker-Feldman Doctrine, the Supreme Court stated:

> Disposition of the federal action, once the state-court adjudication is complete,

> would be governed by preclusion law. The Full Faith and Credit Act, 28 U.S.C. § 1738, . . . requires the federal court to "give the same preclusive effect to a state-court judgment as another court of that State would give." Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 523 (1986); accord Matsushita Elec. Industrial Co. v. Epstein, 516 U.S. 367, 373 (1996); Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380-81 (1985). Preclusion, of course, is not a jurisdictional matter. See Fed. Rule Civ. Proc. 8(c) (listing res judicata as an affirmative defense). . . .
>
> Nor does § 1257 [the statutory equivalent of the Rooker-Feldman Doctrine] stop a district court from exercising subject matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. If a federal plaintiff "present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case as to which he was a party . . ., then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion." GASH Assocs. v. Village of Rosemont, 995 F.2d 726, 728 (7th Cir. 1993); accord Noel v. Hall, 341 F.3d 1148, 1163-64 (9th Cir. 2003).

Id. at 1527. This language appears to strengthen Rooker-Feldman's "actually litigated" element. Any independent claim attached to an otherwise redundant complaint, even if the second complaint voids a state court's legal conclusion, removes the question from the Rooker-Feldman sphere and places the question in the res judicata or preclusion sphere. In other words, the new claim means the second claim was not "actually litigated" in state court. Therefore, while federal jurisdiction may not be barred by the Rooker-Feldman Doctrine, a defendant is free to raise the affirmative defense of issue preclusion as defined by state law. Id.

Here, the City admits that the claims are not precisely the same as they were before Judge Carrafiello when it states Harden's federal case "re-alleges almost every fact and legal issue that was raised or could have been raised in the state court proceedings." (Def.'s Summ. J. Mot. at 10) (emphasis added). In the footnote that follows this sentence, the City argues that the additional claims and further constitutional violations alleged by Harden should have been

included in his prior complaint and that he is precluded from arguing them in federal court. (Def.'s Summ. J. Mot. at 10, n. 3) (stating, "plaintiff's current civil action makes references to alleged unlawful actions taken by the City of Philadelphia on March 17, 2003, April 15, 2003, and April 17, 2003 against HCFD. While these alleged occurrences are not specifically mentioned in the state court pleadings or in Judge Carrafiello's Order of January 30, 2003, it is of no legal significance because HCFD's civil action alleging constitutional violations and money damages remained open until November 6, 2003. Thus, plaintiff's corporation [HCFD] could have and should have litigated these claims in the earlier state court proceedings. (citations omitted.)). Although I ultimately agree with the City, I do so because of the issue preclusion doctrine, not the Rooker-Feldman Doctrine. It is clear that the City has not satisfied the Rooker-Feldman Doctrine's "actually litigated" element.

C. Issue Preclusion

Like the Rooker-Feldman Doctrine, issue preclusion bars re-litigation of identical issues adjudicated in a prior action against the same party or a party in privity. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979). Unlike the Rooker-Feldman Doctrine, a loss in state court is not a prerequisite for the doctrine's application. Issue preclusion is based on the principle that later courts should honor the first decision on a matter that has been actually litigated. Burlington N. R.R. v. Hyundai Merchant Marine Co., 63 F.3d 1227, 1231 (3d Cir. 1995). This doctrine guarantees that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Montana v. United States, 440 U.S. 147, 153 (1979).

The Full Faith and Credit Act, 28 U.S.C. § 1738, requires me to give state court decisions the same preclusive effect that they would be given "in the courts of the rendering state." Del. River Port Auth. v. FOP, Penn-Jersey Lodge 30, 290 F.3d 567, 573 (3d Cir. 2002). Determining the preclusive effect of a law requires looking to the law of the adjudicating state, here Pennsylvania. Id. Under Pennsylvania law, issue preclusion applies where:

> (1) the issue decided in the prior adjudication was identical with the one presented in the later action;
>
> (2) there was a final judgment on the merits;
>
> (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and
>
> (4) the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in a prior action.

Greenleaf v. Garlock, Inc., 174 F.3d 352, 357-58 (3d Cir. 1999).

1. Identical Issue

For issue preclusion to apply, the issue decided in the prior, state court adjudication must have been identical to the one presented here. Id. at 357. "Identity of the issue is established by showing that the same general legal rules govern both cases and that the facts of both cases are indistinguishable as measured by those rules." Suppan v. Dadonna, 203 F.3d 228, 233 (3d Cir. 2000) (internal quotations omitted). As the moving party, the City has the burden to demonstrate that the "issue actually litigated" in the state court action is identical to the current issue. Id. "To defeat a finding of identity of the issues for preclusion purposes, the difference in the applicable

legal standards must be substantial."[1] Raytech Corp. v. White, 54 F.3d 187, 191 (3d Cir. 1995) (internal quotations omitted). As stated by the United States Court of Appeals for the Fifth Circuit, "[t]here are circumstances when the same historical factual circumstances may be involved in two actions, but the legal significance of the fact differs in the two actions because different legal standards are simultaneously applicable to it. This is a very narrow exception to the rule with respect to identity of the issues, however, and is applicable only when there is a demonstrable difference in the legal standards by which the facts are evaluated." James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 459 n.8 (5th Cir. 1971).

To resolve this issue, I must identify the precise question or questions at issue both in the state court litigation and the current litigation. The factual predicates for both actions are almost identical. One difference is the state court action was filed by HCFD, while the federal action was filed by Harden. Another difference is that the federal complaint references additional City violations in March and April of 2003. The state court complaint did not mention these dates because it was filed on January 28, 2003. Due to the fact that the same essential factual predicate gave rise to both claims, the plaintiffs in both suits have brought essentially the same issues. In the prior state court litigation, HCFD brought suit alleging that the City issued several notices and "cease operations" orders in violation of the HCFD's alleged constitutional rights, including the loss of business revenue. (Defs.' Summ. J. Mot., Ex. A ("Pl.'s State Court Compl.")). The only remaining count of Harden's federal complaint alleges that the City issued several notices

[1] Requiring a substantial difference test for the "identical issue" component of issue preclusion highlights another difference between it and the Rooker-Feldman Doctrine. As stated above, Exxon-Mobile requires strict parallel between the issues brought before the state court and the federal court. Exxon-Mobile, Corp., et al., 125 S. Ct. at 1527. The doctrine of issue preclusion, however, requires a substantial difference between the legal standards applied in the first and second actions in order for a court to find that the first element of the doctrine has not been met.

and "cease operations" orders in violation of Harden's alleged constitutional rights, including the loss of business revenue. At their core, both actions attack the "cease operations" orders and how the City carried out those orders. There is not a substantial or demonstrable difference in the legal standards by which the facts alleged would be evaluated. Therefore, the City has demonstrated that Harden has presented the identical issue that HCFD presented in its state court action.

2. Final Judgment on the Merits

There also must have been a final judgment on the merits for an issue preclusion defense to be proper. Greenleaf, 174 F.3d at 357. Judge Carrafiello's order regarding the constitutionality of the violation notices and the "cease operations" orders is final for issue preclusion purposes because it has never been reversed on appeal. See Baker by Thomas v. GMC, 522 U.S. 222, 234 (1998) (recognizing that equity decrees are equivalent to judgments at law and entitled to nationwide recognition). However, as mentioned above, Judge Carrafiello's order specifically refused to decide whether the other tenants who were not a party to the HCFD lawsuit had a right to be in the building. As will be explained in the next section, Harden cannot claim that his federal lawsuit was brought to fill the hole that Judge Carrafiello's decision left because he was not one of the "other tenants." In fact, he was not a separate entity from HCFD for issue preclusion purposes.

3. Same Parties or the Privities

Fairness dictates that a party to a second lawsuit should only be barred by issue preclusion if that party had a full and fair opportunity to present their legal issues in the prior lawsuit. The traditional exception to this rule is that the privies of parties to the initial litigation are also bound

by the result of the prior lawsuit. NLRB v. Donna-Lee Sportswear Co., 836 F.2d 31, 35 (1st Cir. 1987) (privity found between board and Local 229 because their interests cannot be disassociated from each other and are virtually identical). "As many courts have stated: 'There is no bright line rule for determining when parties are in privity.' Rather privity is a legal determination for the trial court with regard to whether the relationship between the parties is sufficiently close to support preclusion." 18 Moore's Federal Practice - Civil § 132.04(1)(b)(ii) (citing Amalgamated Sugar v. NL Indus., 825 F.2d 634, 640-41 (2d Cir. 1987)).

A corporation, such as HCFD, is usually treated as a jural person distinct from its stockholders, members, directors, and officers. Accordingly, it is a general rule that "a judgment in an action to which a corporation is a party has no preclusive effects on a person who is an officer, director, stockholder, or member of a non-stock corporation. . . ." Restatement of the Law, 2d , Judgments, § 59. However, there are exceptions to this general rule. One such exception is relevant to the current case. If the corporation is closely held, where one or few people own it, the judgment in the prior lawsuit binds ownership of the corporation if the owner actively participated in the prior lawsuit. Id.

A similar case to the one at bar was decided by the United States Court of Appeals for the Second Circuit ("Second Circuit") in the decision Kreager v. General Electric Co., et al., 497 F.2d 468 (2d Cir. 1974). Kreager commenced the first of his private antitrust actions in the name of his wholly owned corporation, Mercu-Ray. Id. at 470. He lost. Id. "The complaint in Kreager's second action, commenced simultaneously with the dismissal of the first, virtually tracked the complaint in the prior action, except that it alleged that the defendants continued their conspiracy against Mercu-Ray by defending the first action. Kreager substituted himself for

Mercu-Ray as plaintiff in the second action." Id. at 470-71. The Second Circuit held that "Kreager, as the sole shareholder of Mercu-Ray, was bound by the dismissal of the first action brought in the name of his corporation." Id. at 471. One of the crucial factors for the decision was the fact that Kreager had participated in and "effectively controlled" the first action by being present in court, attending conferences in chambers, and was the corporation's principal witness. Id.

The goal of the claim preclusion privity rule is to prevent a litigant from having two bites of the litigation apple by suing once as a corporation and once as an individual. The City correctly argues that Harden's current lawsuit attempts to appeal his state court loss in which he sued as HCFD. By failing to respond to the City's Motion, Harden has abrogated his right to contest the following facts alleged by the City regarding the relationship between HCFD and himself:

> The company known as HCFD is really the "trading as title" for Harden Communication[s]. Mr. Harden was the sole shareholder of Harden Communications. Exhibit "E" at 8-9. HCFD is [a] "management entity for Joel Harden." Exhibit "E" at 10. Harden Communications did not keep corporate minutes and only Mr. Harden had the authority to sign checks on behalf of Harden Communications. Exhibit "E" at 21-22. In essence, Harden Communications and HCFD acted as Joel Harden's personal management company to funnel money between himself and his creditors. As Mr. Harden explained at his deposition, "Well, HCFD essentially functioned as a management company for, you know, my interests. So this is not like – unlike any management operation. The money is taken and it goes into a management account. It's then dispersed to pay creditors and vendors, so on and so forth." Exhibit "E" at 36.

(Def.'s Summ. J. Mot. at 8). At his deposition, Harden also testified that there was no difference between himself and HCFD because he was sole shareholder of HCFD and because if HCFD won at the state court level he would benefit. (Def.'s Summ. J. Mot., Ex. E at 66-67).

Furthermore, Harden was the sole witness for HCFD at the state court trial. HCFD and Harden are interchangeable for issue preclusion purposes. If HCFD is bound by the state court decision, then so is Harden.

4. Full and Fair Opportunity to Litigate

For issue preclusion to apply, the party against whom it is asserted must have had a full and fair opportunity to litigate the issue in question in a prior action. Greenleaf, 174 F.3d at 358. "An issue is 'actually litigated' when it 'is properly raised, by pleadings or otherwise, is submitted for determination, and is determined.'" O'Leary v. Liberty Mutual Insurance Co., 923 F.2d 1062, 1066 (3d Cir. 1991) (quoting Restatement (Second) of Judgments § 27 comment d, at 255 (1982)). A party "is precluded from litigating in a subsequent proceeding both claims that it actually litigated and claims that it could have litigated in an earlier proceeding." Ivy Club v. Edwards, 943 F.2d 270, 294 (3d Cir. 1991) (analyzing New Jersey's Entire Controversy Doctrine). Pennsylvania law also precludes a party from litigating in a subsequent proceeding claims that it actually litigated as well as claims that it could have litigated in an earlier proceeding. Pa. Rule. Civ. Proc. 1020(d). Pennsylvania Rule of Civil Procedure 1020(d) requires a party to join all causes of action against the same defendant based on different legal theories arising out of the same factual transaction. Id.

At the hearing before Judge Carrafiello, Harden had a full and fair opportunity to raise any legal issue stemming from his dispute with the City over the signs his corporation, HCFD, was ordered to remove. Harden had the opportunity to raise his legal claims. He testified that the City had violated his rights by issuing and then enforcing its "cease operations" orders. He had the opportunity to question the City's witnesses. In short, he was provided with all the due

process protections to which he was entitled. As Judge Carrafiello told Harden's lawyer at the conclusion of the case, "you lost the case. . . . I have done what I had to do. And it's unfortunate, because it's not what I wanted to do." (Defs.' Summ. J. Mot., Ex. B at 44). Harden cannot, after losing as HCFD in state court, seek relief for identical issues, or issues that should have been raised in his prior suit, in federal court.

Therefore, as all for elements have been met, the doctrine of issue preclusion bars Harden's § 1983 claim against the City.

IV. CONCLUSION

For the foregoing reasons, the City's motion for summary judgment is granted. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOEL HARDEN,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	No. 05-120
CITY OF PHILADELPHIA, et al.,	:	
Defendants.	:	

O R D E R

AND NOW, this 9th day of January, 2006, having considered Defendant's Motion for Summary Judgment (Doc. No. 12) and whether Defendant's Motion was appropriate under Federal Rule of Civil Procedure 56(e), it is hereby **ORDERED** that Defendant's Motion is **GRANTED**.

BY THE COURT:

/s/ Robert F. Kelly
ROBERT F. KELLY, Sr. J.